Wyandanch Engine Rebuilders, Inc., and Long Island Engine Installation Center, Inc., and D. Engine Rebuilders, Inc., The Engine Factory and The Engine Factory #1, Ltd. *and* Local 239, International Brotherhood of Teamsters, AFL-CIO

D. Engine Rebuilders, Inc., The Engine Factory and The Engine Factory #1, LTD. *and* Local 239, International Brotherhood of Teamsters, AFL–CIO. Cases 29–CA–18139, 29–CA–19927, 29–CA–20511, and 29–CA–21042

June 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On July 6, 1998, Administrative Law Judge Howard Edelman issued the attached decision. Respondents Wyandanch Engine Rebuilders, Inc. (WER) and Long Island Engine Installation Center, Inc. (LIE) filed exceptions, the Acting General Counsel filed limited exceptions and a motion to reject the exceptions filed by Respondents WER and LIE, and the Charging Party filed a brief in limited answer to the Acting General Counsel's limited exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

CONCLUSIONS OF LAW

1. Respondents WER, LIE, DER, EF, and EF#1 are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents WER and LIE constitute a single integrated business and are a single employer within the meaning of the Act.

3. Respondents DER, EF and EF#1 constitute a single integrated business and are a single employer within the meaning of the Act.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. Automotive Parts Distributors Association (APDA) is an employer association engaged in negotiating collective-bargaining agreements on behalf of its members.

6. At all times material, Respondents WER and LIE have been members of APDA and have designated it to conduct collective-bargaining negotiations on their behalf.

7. Pursuant to a collective-bargaining agreement negotiated between APDA and the Union, expiring on March 31, 1995, the Union was the collective-bargaining representative of the following appropriate unit of Respondents WER and LIE's employees:

> All auto electricians, auto mechanics, auto mechanic helpers, bookkeepers, clericals, drivers, foremen, glaziers, head office clericals, head parts clerks, head shipping and receiving clerk and dispatcher, machinists, machinists helpers, parts clerks, rebuilders, shipping and receiving clerks, and shop helpers, employed by Respondents at their Wyandanch, New York, facility, excluding all other employees, guards and supervisors as defined in Section 2(11) of the Act.

8. Respondents DER, EF, and EF#1 are successor employers to Respondents WER and LIE.

9. From October 26, 1993, until April 1996, when they ceased operations, Respondents WER and LIE failed and refused to remit payments to the welfare and pension funds, as provided for in their collective-bargaining agreement, which expired on March 31, 1995, in violation of Section 8(a)(5) and (1) of the Act.

10. From October 26, 1993, through April 1996, Respondents WER, LIE, DER, EF and EF#1, have refused jointly and severally to remit payments to the welfare and pension funds, required by the collective-bargaining agreement which expired on March 31, 1995, in violation of Section 8(a)(5) and (1) of the Act.

11. On or about December 20, 1995, Respondents DER, EF, and EF#1 recognized the Union as the exclusive collective-bargaining representative for its employees in the unit described above, and commenced individual collective-bargaining negotiations with the Union.

12. From January 10, 1996, until July 23, 1996, Respondents DER, EF, and EF#1 failed to meet with the Union to engage in collective bargaining, and indicated that they would not recognize or bargain with the Union without an illegal loan, in violation of Section 8(a)(5) and (1) of the Act.

13. Respondents DER, EF, and EF#1 dealt directly with the unit employees, notwithstanding that such employees were represented by the Union, in violation of Section 8(a)(5) and (1) of the Act.

14. Respondents DER, EF, and EF#1 reached agreement on all terms and conditions for a collective-bargaining agreement.

[1] Although the exceptions filed by Respondents WER and LIE do not fully comply with Sec. 102.46 of the Board's Rules and Regulations, they are sufficient to warrant Board consideration, and we deny the Acting General Counsel's motion to dismiss them.

[2] In the absence of exceptions filed by Respondents D. Engine Rebuilders, Inc. (DER), The Engine Factory (EF), and The Engine Factory #1, Ltd. (EF#1), we adopt pro forma the judge's findings that DER, EF, and EF#1 violated the Act in several respects.

[3] We grant the Acting General Counsel's limited exceptions and the Charging Party's answer to them and correct the inadvertent errors in the judge's conclusions of law, remedy, Order, and notice. We shall also include in our Orders and notices language in accord with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified by *Excel Container*, 325 NLRB No. 14 (1997).

We particularly appreciate the care with which the Acting General Counsel raised exceptions and suggested correction of inadvertent errors regardless of the party benefitting.

15. Respondents DER, EF, and EF#1 refused to execute the collective-bargaining agreement, although requested by the Union to do so, in violation of Section 8(a)(5) and (1) of the Act.

16. Respondents DER, EF, and EF#1 withdrew recognition from the Union in violation of Section 8(a)(5), (4) and (1) of the Act.

17. Respondents DER, EF, and EF#1 threatened its employees with plant closure and loss of sales because of their membership in, and/or their activities on behalf of, the Union, in violation of Section 8(a)(1) of the Act.

18. Respondents DER, EF, and EF#1 discharged its employees Albert Buehler and John Beatty because of their membership in, and/or their activities on behalf of, the Union, in violation of Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondents to:

1. Respondent WER, LIE, DER, EF, and EF#1 must jointly and severally make whole its unit employees by making delinquent payments, owed from October 26, 1993, through April 1996, to the pension and welfare funds, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

2. Respondents DER, EF, and EF#1 must, upon requests by the Union, execute the collective-bargaining agreement agreed upon on August 7, 1996.

3. Respondents DER, EF, and EF#1 must offer to reinstate Albert Buehler and John Beatty to their former, or substantially equivalent positions of employment, and make them whole for any loss of earnings and/or other benefits they may have suffered from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed above.

[4] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

ORDER

A. The National Labor Relations Board orders that the Respondents Wyandanch Engine Rebuilders, Inc. (WER) and Long Island Engine Installation Center, Inc. (LIE), Wyandanch, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to remit payments to the welfare and pension funds as provided in the collective-bargaining agreement between the Respondents and the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally make all contractually required payments to the welfare and pension funds for the delinquent payments owed from October 26, 1993, through April, 1996, and make the unit employees whole in the manner set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(c) Within 14 days after service by the Region, post at the Wyandanch, New York facility copies of the attached notice marked "Appendix A."[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including places where the notices to the employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, any of the Respondents have gone out of business or closed any facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 26, 1993.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

B. The National Labor Relations Board orders that the Respondents DER, EF, and EF#1, Wyandanch, New York, their officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing to remit payments to the welfare and pension funds as provided in the collective-bargaining agreement between the Respondents and the Union.

(b) Failing to meet and bargain with the Union and indicating that it would not recognize the Union or sign a contract in the absence of an illegal loan.

(c) Dealing directly with employees.

(d) Refusing to execute a collective-bargaining agreement all of whose terms and conditions of employment were agreed upon, although requested by the Union to do so.

(e) Withdrawing recognition from the Union.

(f) Threatening employees with plant closure because of their membership in, or activities on behalf of, the Union.

(g) Discharging employees Albert Buehler and John Beatty because of their membership in, or activities on behalf of, the Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally make all contractually required payments to the welfare and pension funds for the delinquent payments owed from October 26, 1993, through April 1996, and make the unit employees whole in the manner set forth in the remedy section of this decision.

(b) Recognize and bargain with the Union, and on request by the Union, execute the collective-bargaining agreement agreed on on August 7, 1996, and make whole the unit employees represented by the Union for any wages or benefits they would have received pursuant to the terms and conditions of the agreement with interest as computed by *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, offer Albert Buehler and John Beatty full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Albert Buehler and John Beatty whole for any loss of earnings and/or other benefits they may have suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Albert Buehler and John Beatty and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Wyandanch, New York facility copies of the attached notice marked "Appendix B."[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including places where the notices to the employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 26, 1993.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to remit payments to the welfare and pension funds as provided in the collective-bargaining agreements between us and the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all contractually required payments to the pension and welfare funds that we have failed to make from October 26, 1993, through April, 1996, and WE WILL make the unit employees whole in the manner set forth in a decision of the National Labor Relations Board.

[6] See fn. 5.

WYANDANCH ENGINE REBUILDERS, INC., AND LONG ISLAND ENGINE INSTALLATION CENTER, INC.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to remit payments to the welfare and pension funds as provided in the collective-bargaining agreements between us and the Union.

WE WILL NOT fail to recognize, meet, and bargain with the Union, and refuse to sign a contract or recognize the Union in the absence of an illegal loan.

WE WILL NOT deal directly with our employees represented by the Union.

WE WILL NOT refuse to execute a collective-bargaining agreement in which all terms and conditions of employment are agreed on, although requested by the Union to do so.

WE WILL NOT unlawfully withdraw recognition from the Union.

WE WILL NOT threaten our employees with plant closure because of their membership in, or activities on behalf of, the Union.

WE WILL NOT discharge employees because of their membership in, or activities on behalf of, the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all contractually required payments to the pension and welfare funds that we have failed to make from October 26, 1993, through April 1996, and WE WILL make the unit employees whole in the manner set forth in a decision of the National Labor Relations Board.

WE WILL recognize the Union as the collective-bargaining representative of our employees and execute the collective-bargaining agreement agreed on on August 7, 1996, and make whole the unit employees represented by the Union for any loss of wages or other benefits that they may have incurred, plus interest.

WE WILL offer to Albert Buehler and John Beatty full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and/or other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL notify Albert Buehler and John Beatty that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

D. ENGINE REBUILDERS, INC., THE ENGINE FACTORY, AND THE ENGINE FACTORY #1, LTD.

Rosalind Rowen, Esq., for the General Counsel.
Mark Krieg, Esq., for Respondents WER and LIE.
Roy Barnes, Esg. and *Steven Kern, Esq.,* for the Union.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on July 8 and October 6 and 7, 1997, in Brooklyn, and New York, New York. Based on various charges filed by Local 239, International Brotherhood of Teamsters, AFL–CIO (the Union or Local 239), a number of complaints issued, the last of which was an order further consolidating cases, amended consolidated complaint, and notice of trial dated June 23, 1997. These complaints alleged that the Respondents set forth in the above caption violated Section 8(a)(1), (3), (4), and (5) of the Act.

On the entire record in this case, including my observation of the demeanor of the witnesses, and a careful consideration the excellent brief submitted by counsel for the General Counsel and the letter brief submitted by the Union, I made the following findings of fact and conclusions of law. Respondents did not submit any briefs.

Wyandanch Engine Rebuilders, Inc. (Wyandanch Engine or WER) is a New York corporation engaged in the business of providing engine repair and related services, on both a retail and nonretail basis. During the calendar year ending December 31, 1995, Respondent WER, in the course and conduct of its business operations, derived gross revenues in excess of $500,000. During the calendar year ending December 31, 1995, Respondent WER, in the course and conduct of its business operations, purchased and received at its Wyandanch facility engine parts, tools, supplies, goods, and other materials, valued in excess of $5000, directly from points located outside the State of New York.

I conclude that Respondent WER is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Long Island Engine Installation Center, Inc. (Respondent Long Island Engine or LIE) is a New York corporation engaged in the business of providing engine installation, and related services, on both a retail and nonretail basis. During the calendar year ending December 31, 1995, Respondent LIE, in the course and conduct of its business operations derived gross annual revenues therefrom in excess of $500,000. During the calendar year ending December 31, 1995, Respondent LIE, in the course and conduct of its business operations, purchased and received at its Wyandanch facility engine parts, tools, supplies, goods, and other materials, valued in excess of $5000, directly from points outside the State of New York.

I conclude that Respondent LIE is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

D. Engine Rebuilders, Inc. (Respondent D. Engine) is a New York corporation engaged in the business of providing engine repair and installation and related services, on both a retail and

nonretail basis. During the past year, Respondent D. Engine, in the course and conduct of its business operations has derived gross annual revenues therefrom in excess of $500,000. During the past year, Respondent D. Engine, in the course and conduct of its business operations has purchased and received at its Wyandanch facility engine parts, tools, supplies, goods, and other materials, valued in excess of $5000, directly from points located outside the State of New York.

I conclude that Respondent D. Engine is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Engine Factory #1, Ltd. (Respondent Engine Factory) a New York corporation since July 1996, is engaged in the business of providing engine repair and installation and related services, on both a retail and nonretail basis. Based on a projection of its operations since in or about July 1996, at which time it commenced operations, Respondent Engine Factory, in the course and conduct of its business operations will derive gross annual revenues therefrom in excess of $500,000. Based on a projection of its operations since in or about July 1996, at which time it commenced operations. Respondent Engine Factory, in the course and conduct of its business operations will annually purchase and receive at its Wyandanch facility, engine parts, tools, supplies, goods, and other materials, valued in excess of $5000, directly from points located outside the State of New York.

I conclude that Respondent Engine Factory is an employer, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

WER and LIE were operational from 1982 until April 1996. Wyandanch Engine was an engine rebuilding company. LIE installed the engines that had been rebuilt by WER into motor vehicles. BothCcompanies operated out of the same building, at 188 Long Island Avenue, Wyandanch, New York (the Wyandanch facility, the building, or the facility).

In 1985, Anthony DiPrima purchased WER, LIE, and the Wyandanch facility from John Franke, their previous owner. The building remained in DePrima's own name and Wyandanch Engine made rent payments of $5000 per month to him.

From late 1995 or early 1996, WER and LIE were operated concurrently by DiPrima at the Wyandanch facility. DiPrima was the president and sole shareholder of both Companies during that period. After DiPrima purchased LIE and WER, the two companies continued in the same line of business; there was no change in the functions performed by the two Companies, or the functions performed by the employees. Of the 20 employees who had been working for the two Companies under Franke's ownership, DiPrima retained 17, in the same positions they had held previously. They constituted a majority of the employee complement. When DiPrima purchased the two Companies, DiPrima kept the same machinery that had been used by Franke, and retained most of his customers.

Under DePrima's ownership, the employees for both Companies worked in separate work areas within the same building. However, there was a common door between the two work areas, and there was interaction throughout the day among employees from the two Companies. Employees from the two companies had the same working hours, and other conditions of employment. Both Employers performed work for the same customers.

WER was a dues-paying member of the Automotive Parts Distributors Association (the APDA) from July 1, 1982, through June 30, 1992. The APDA is a multiemployer association which acts as a collective-bargaining agent for its employer-members in negotiations with Local 239, International Brotherhood of Teamsters, AFL–CIO (the Union, or Local 239).

I conclude Local 239 is a labor organization within the meaning of Section 2(5) of the Act.

The APDA negotiates collective-bargaining agreements through a committee of officers of the association. When a tentative agreement is reached, it is submitted to both the employer-members of the association and to the union membership for a ratification vote. If the vote is favorable, the employer-members then become bound by the contract. It is not the practice for employer-members of the APDA to sign individual consent agreements to be bound by the terms of a collective-bargaining agreement. An employer that wishes to negotiate individually must withdraw from the association prior to the start of negotiations, and notify both the association and the union that it is withdrawing.

A collective-bargaining agreement was negotiated between the APDA and the Union, effective April 1, 1992, through March 31, 1995. Negotiations between the APDA and the Union commenced towards the end of 1991, or the beginning of 1992. WER did not withdraw from the Association prior to the commencement of negotiations, or at any other time.

On May 20, 1992, Herbert Levine, attorney for the APDA, sent a letter to all APDA employer-members, stating that the new collective-bargaining agreement effective April 1, 1992, through May 31, 1995, had been ratified, and enclosed a copy of the agreement. The May 20, 1992 letter, included a postscript, which was only sent to APDA members who were behind in their dues payments, including WER. The postscript stated, "According to our records you are in arrears in dues. Thus you will be subject to individual negotiations with the Union. If you wish to make yourself current, we will send a copy of the agreement to you upon receipt of your payment."

After receiving this letter, WER brought itself up to date on its dues payments through June 20, 1992.

In 1985, when DiPrima acquired WER and LIE, both WER and LIE applied the provisions of each successive Local 239 collective-bargaining agreements to their employees. From 1985 through 1995, employees of both companies were given the wage increases, vacations, holidays, and sick days set forth in the Local 239 collective-bargaining agreements. During those years, dues were deducted from the employees paychecks, and layoffs were conducted in seniority order as provided in the Local 239 contracts. From 1985 through 1991, Wyandanch Engine consistently made contractual contributions to the Local 239 pension and welfare funds.

Although the pension and welfare contributions were drawn on the Wyandanch Engine bank account only, pension and welfare contributions were made on behalf of the Long Island Engine employees as well, who were listed as Wyandanch Engine employees in DiPrima's written communications with the Union. The practice of making payments in behalf of LIE employees but listing them as WER employees was also followed with respect to union dues. DiPrima deducted union dues from employees paychecks and forwarded the dues to the Union through 1994, at which point DiPrima continued to make the deductions but failed to forward the money to the Union. At that point, the remaining union members began to pay their dues directly to their union representatives. In April 1995, for

the first time, employees were not paid their contractual wage increases, and DiPrima told Buehler that he had withdrawn from the APDA.

In 1991, WER began to get behind in its payments to the pension and welfare funds. The last payments into both funds were made in the spring of 1993. According to DiPrima, lack of money was the primary reason he stopped making contributions to the pension and welfare funds.

On or about 1994, Local 239 filed for arbitration over WER's failure to pay into the funds, as well as filing an unfair labor practice charge with the Board. A complaint was issued on June 30, 1994, alleging the failure to make funds contributions as violative of Section 8(a)(5) of the Act.

On September 21, 1995, WER, by DiPrima, filed for Chapter 11 bankruptcy protection. The bankruptcy petition reflected that the Local 239 pension and welfare funds, with their $135,500,00 claim, were Wyandanch Engines largest creditor, other than DiPrima himself.

However, while enjoying the benefits of Chapter 11 protection, WER failed to comply with any of the requirements of the U.S. Bankruptcy Code. On April 2, 1996, the United States Trustee moved to convert the bankruptcy case to a case under Chapter 7 of the bankruptcy code. Under Chapter 7, a debtor is normally required to liquidate its assets to pay off its creditors. E.g., 11 U.S.C. Section 726 (distribution of property of the estate). However, rather than pay off its creditors, Wyandanch Engine transferred or sold its assets to D. Engine Rebuilders, Inc., a company owned and operated by Bruce Canonico. D. Engine continued to run the business at the Wyandanch facility in unchanged form. Both WER and LIE ceased doing business in April 1996.

DiPrima first met Canonico late in 1995, at the Wyandanch facility. He was introduced to Canonico through a Wyandanch Engine employee, named David Rassman, who was Canonico's friend. This employee apprised Canonico that DiPrima owned the Union over $250,000 in retroactive pension and welfare payments.

There followed a series of meetings between DiPrima and Canonico, during a 1-month period. They spoke daily about whether it would be worthwhile for Canonico to take over the operations of WER and LIE and buy the building. They also discussed the terms of a possible purchase agreement. During their first meeting, DiPrima told Canonico about the debt to the Union's pension and welfare funds, as well as the fact that WER had filed for bankruptcy protection.

Canonico failed to appear at the instant trial, although subpoened by counsel for the General Counsel. However, his affidavit was received into evidence and set forth: "When I purchased the company, I talked to the previous owner's lawyer, who told me the Union was in a court case with the previous owner "

Canonico and DiPrima entered into a written agreement which was never signed but which stated that "Anthony DiPrima hereby sells Wyandanch Engine Rebuilders & Long Island Engines, Inc., and all stock, inventory, tools, machines, lifts, business phone numbers, accounts and contents to D. Engine Rebuilders, Inc." It also stated that D. Engine would pay "$2000 per month to Anthony DiPrima to pay his back taxes." It further stated that D. Engine, "will pay $4,600.00 per month on $400,000.00 worth of mortgages Anthony [sic] Diprima owes to Continental Bank . . . directly to the bank as rent, until such time when D. Engine Rebuilders, Inc., refinances buildings." It further provided that "Anthony Diprima for further compensation, will remain an employee of D. Engine, as a manager for the sum of $500.00 per week take home salary." It was admitted during the trial, that DiPrima was a supervisor within Section 2(11) of the Act.

Although DiPrima denied having ever entered into a written agreement to sell WER and LIE, DiPrima's testimony regarding his transaction with Canonico was consistent with such agreement. For example, DiPrima testified that "part of the deal [he] made with Bruce [Canonico]" was that Canonico would retain him as a manager. DiPrima told Canonico that he would require a salary of $600 per week and Canonico agreed to this salary. DiPrima also testified that he and Canonico agreed that Canonico would pay approximately $50,000 in environmental cleanup costs associated with the facility.

In addition, DiPrima testified that on April 21, 1996, he signed over the deed to the building to Funding Unlimited, Ltd., a corporation controlled by Canonico. In connection with this transaction, DiPrima and Funding Unlimited, Ltd. filed tax forms with the New York State Department of Taxation and Finance, which stated, inter alia, that the amount of consideration for the conveyance was $300,000. After April 12 , 1996, Canonico started making mortgage payments on the building.

On April 25, 1996, DiPrima and Canonico executed a Transfer and Assumption Agreement, whereby WER agreed to transfer a vertical honing machine to D. Engine, subject to the security interest of Sunnen Products. The agreement provided that D. Engine would agree to pay the remaining installments, totaling $8,129.79, on a conditional sale contract between WER and Sunnen Products. Numerous other machines that had been used by Wyandanch Engine and Long Island Engine were also transferred to Canonico, subject to the security interest of Continental Bank. DiPrima also testified that Canonico "took over" the existing office equipment and the two vehicles that had been owned by WER, without paying for them.

In the beginning of December 1995, at a meeting of all the employees, Canonico introduced himself as the new owner of WER and LIE. He told the employees that their jobs were safe, that he realized that it was a union shop, and that "first and foremost" his priority was to restore Union benefits to the employees. During the first week of December 1995, employees were instructed to start saying "D. Engine" when they answered the telephone, and [a] (a)D. Engine business certificate began to be displayed in the office. Also in early December 1995, suppliers began to be paid with D. Engine checks and D. Engine invoices began to be issued to customers. However, the name "D. Engine" did not start appearing on employees' paystubs until April 1996, and a sign saying "Wyandanch Engine" remained on the building.

D. Engine occupies the same building that had been occupied by WER and LIE. It is in the business of manufacturing, rebuilding, and installing automotive engines. The functions performed by D. Engine are the same functions that had been performed by both WER and LIE. D. Engine retained DiPrima's suppliers.

Starting in July 1996, the name "The Engine Factory" began to appear on employees' paystubs. This corporate name was not used in any other aspect of the running of the business. In July 1996, Canonico began to meet and bargain with the Union. During the bargaining sessions, the name "The Engine Factory" appeared on Canonico's contract proposals. Albert Buehler, an employee testified that Canonico told him that he was using the

name "The Engine Factory to negotiate with the Union, so that he could claim that all his employees were new employees and that they should not be eligible for any union benefits for 1 year.

Additionally, DiPrima testified that he believed The Engine Factory #1 "was a name at one point also." DiPrima had heard of "The Engine Factory #1" through Canonico, but did not know much about it.

On a visit to the facility on December 20, 1995, Anthony Evaristo, business agent for Local 239, and Anthony Micelli, the Union's secretary-treasurer, learned through an employee that he and Canonico had taken over the Company. During this visit, Canonico told Evaristo that he wanted to restore benefits coverage for his employees, and that he realized that the previous ownership owed the Union about $250,000. Evaristo replied that the Union would not try to hold him liable for DiPrima's debt as long as he bargained with the Union in good faith. Canonico proposed that if the Union advanced him a loan equal to the amount of money DiPrima owed the Union, he would sign a contract tomorrow. The union agents declined. However, a meeting was set for January 10, 1996, at the Union's offices.

Canonico did not show up at the January 10, 1996 meeting, nor did he call to cancel. Further meetings were scheduled for February 9 and March 25, 1996, with the same result. When Canonico failed to appear for the March 25 meeting, Evaristo and Micelli visited Canonico at the Wyandanch facility. On that date, Canonico asked the union officials how much the Union's medical coverage would cost per employee. Evaristo and Micelli quoted him the welfare and pension contribution figures from the current APDA contract, and Canonico had a secretary calculate how much it would cost to cover all the employees. While discussing the pension and welfare benefits, Canonico stated that he did not want to get into the same position that DiPrima was in. Also on March 25, the parties set up a further meeting for April 3, 1996, at the Union's offices. When Canonico failed to appear at the April 3 meeting, Evaristo sent a letter to Canonico, suggesting that the meeting be rescheduled. There was no response.

On April 15, 1996, the Union filed a charge against D. Engine regarding its failure to meet and bargain with the Union. Shortly after receiving a copy of the charge, Canonico told Buehler that his biggest mistake was not closing the door when he first bought the business and rehiring everybody on a nonunion basis. Canonico further stated that if things did not go his way, he would close the door, wait whatever extended period of time he had to in order to get away with it, and reopen as a nonunion shop. He would then hire back the employees that wished to be hired on his own terms. Also during the spring of 1996, Shop Foreman Dennis Tyce walked through the shop and individually polled each employee as to whether they would be willing to pay for half their medical coverage.

In a telephone conversation on June 12, 1996, Canonico told Evaristo he wanted the Union to lend him $300,000, and Evaristo declined. Canonico replied that if there were no loan, there would be no union at his facility, and the conversation stalemated.

A meeting between the Union and Canonico be as (was) scheduled for July 23, 1996. Present at the meeting were Canonico, Evaristo, Micelli, and Buehler. Canonico presented the Union with a list of 10 management proposals, but stated that everything was negotiable. After discussing the proposals with Canonico, Evaristo told him that the Union would come back with a counterproposal after discussing his proposals with the men. That same night, Evaristo went over Canonico's proposals with the union members, noting in the margins the members positions on these proposals. These positions were then incorporated into the Union's counterproposals.

The Union presented its counterproposals at a meeting which occurred on August 7, 1996, at the Union's offices. Present at the meeting were Canonico, Evaristo, and Buehler. All outstanding issues were resolved at this meeting, including the difficult issues of wages and welfare contributions. After the meeting ended, Evaristo met with the employees. The employees voted to ratify the agreement. Evaristo then told Canonico that the employees had ratified the contract. Canonico replied, "I guess we have a contract." However Canonico refused to sign such contract, although the Union made repeated attempts through a number of scheduled meetings. Canonico failed to appear at any of these meetings.

On or about May 13, 1997, Canonico told the new shop steward, Joe Prevete, that the wanted a number of "minor changes" to the contract that had been agreed on, and that he wanted Prevete to "run them by the men." Although the employees were against Canonico's proposed changes, Canonico told Evaristo that the men had agreed to the changes. These "minor changes" included a proposal that the seniority date for all current employees, regardless of how long they had been working at the facility, would be the date the collective-bargaining agreement was signed, rather than the date the employee was actually hired. This "seniority date" would be used to determine sick leave and vacation time allotments (with employees being granted a total of 1 paid sick day during the first 2 years of the contract), and the timing of raises. Canonico also proposed that the dues-checkoff clause be eliminated, that the union-shop provision be modified to require union membership after 1 year of employment rather than 30 days, and that employees be required to pay their portion of the welfare premiums directly to the Union.

On May 15, 1997, shortly after Evaristo rejected Canonico's proposed changes, Canonico faxed a note to a Board agent at the NLRB, advising her to "Please Let the Union Know they are No Longer Permitted on My Property to Cause Rucas [sic] Among My Happy employees [sic]." Evaristo has not visited the facility since that time, and has been unable to communicate with the employees. Shortly thereafter, Canonico laid off six employees, including the shop steward, Prevete. Former Shop Steward Buehler, was laid off in October 1996. There has been no shop steward at the facility since May 1997. On September 25, 1997, a dues invoice sent to the Wyandanch facility by Evaristo was faxed back to the Union by Canonico with the notation, "Please Note There is No Union here Please Cease & desist [sic] of harassing [sic] Us you are Not Wanted, Needed, or have anything Worthwhile [sic].''

Buehler worked for WER from November 1982, until December 1995, and for D. Engine from December 1995, until his layoff in October 1996. Buehler was the shop steward for Local 239 from 1989 until his layoff in October 1996. In the negotiations between Local 239 and D. Engine, described above, Buehler represented Local 239.

At the time of his layoff, Buehler was a parts manager. When Canonico purchased the company in December 1995, Buehler had retained the job title of "parts manager," but had been given additional responsibilities, including helping with

collection problems, representing the company at trade shows, and negotiating new terms with suppliers who had refused to extend credit to DiPrima.

In October 1996, Buehler was handed a pink slip and told that he was being laid off. When he asked Canonico the reason, Canonico told him that work was "slow." Buehler then asked Canonico why he was not being offered another position, since he was the most senior employee in the shop. Canonico replied that it was not a union shop and he should come back and see him the following week. Buehler returned to the shop three times, and was told each time that work was slow. Ultimately, Canonico offered Buehler a demotion from parts manager to janitor, in a letter faxed to Buehler. Buehler declined the offer, which was later rescinded in Canonico's May 15, 1997 fax.

Nobody else was laid off at the time Buehler was. Buehler credibly testified without contradiction that prior to his layoff, work was not "slow" and business did not drop off. In fact Buehler had been regularly working overtime, staying an hour late each night, working through lunch, and working 4 hours on Saturdays. He had been told by Canonico that if he wished, he could earn additional overtime by coming in prior to 8:30 a.m. Buehler had never been laid off previously, and there was never a problem with his work. As set forth above Canonico did not testify. No evidence was introduced to establish that work was slow at the time of Buehlers' termination.

John Beatty was an employee of WER from 1986, until the fall of 1995. He then worked for D. Engine Rebuilders and The Engine Factory from the fall of 1995 until November 1996, at which time he was laid off or discharged. At the time of his discharge he was an engine builder. When Canonico took over the business in the fall of 1995, there was no change in Beatty's job description or wage rate.

After Canonico took over the business, Beatty attended union meetings about once a month, having been a member of the Union for about 10 years. The meetings generally took place in the front of the shop, near Canonico's office. The other employees who regularly attended union meetings were Shop Steward Albert Buehler, Shop Foreman Dennis Tyce, Louis Ackerly, Kenny Poole, and Joe Prevete. Canonico knew which of his employees were union members.

Since Canonico's takeover of the business, the primary topic of discussion at union meetings was the progress of the negotiations between Canonico and the Union. At a meeting in the yard of the facility in the summer of 1996, at which Shop Foreman Dennis Tyce, a 2(11) supervisor, was also present, Beatty was outspoken in his opposition to Canonico's position that layoffs should be by departmental seniority. About a month later, at a meeting of all the employees at which Shop Foreman Tice was again present, Beatty was the only employee opposed to the proposal that employees pay half the cost of their medical premiums.

On November 14, 1996, after Shop Steward Buehler's layoff, the union members at the facility held an election for a new shop steward. Canonico thought that the next shop steward would be Beatty. The next day, on November 15, 1996, Beatty's pay envelope contained a pink slip in Canonico's handwriting stating, "John Beatty Laid off Till Further Notice Reason Slow." There had been no prior warning that Beatty might be laid off. Before the layoff, Beatty did not notice any slowdown in the level of business, or the level of work. No evidence was introduced which would establish that work was slow. Instead Canonico hired two new engine builders to replace Beatty. An additional engine builder who was not laid off, Don Keith, was very junior in comparison to Beatty. Shortly before Beatty's layoff, Canonico hired an additional two new employees. Prior to his layoff, Beatty was never disciplined, nor was his work ever criticized.

Analysis and Conclusion

When two separate employers constitute a single-employer or single-integrated enterprise, they are jointly and severally liable for one another's unfair labor practices.

JMC Transport, Inc., 283 NLRB 554, 560 (1987); *Emsings Supermarket, Inc*., 284 NLRB 302, 304 (1987). The four operative criteria used to determine whether two separate companies constitute a single-employer or single-integrated enterprise are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *JMC Transport*, supra at 555. However, not one of these factors is controlling, and it is not necessary for all four of these factors to be present. *JMC*, supra at 555; *Blumenfeld Theatres Circuit*, 240 NLRB 206 (1979), enfd, 626 F.2d 865 (9th Cir. 1980). Single employer status depends on all the circumstances of the case. *Emsings Supermarket* at 303, 304; *Blumenfeld,* supra at 215.

The operations of WER and LIE were inextricably intertwined, inasmuch as the same engines that had been rebuilt by WER were then installed into motor vehicles by LIE. There was interaction throughout the day between employees of the two companies, who shared the same working hours and other conditions of employment. In addition, the two companies shared many of the same customers.

DiPrima was the president of both companies. As president, DiPrima established identical labor relations policies for both companies. Throughout DiPrima's tenure, employees of both Companies were covered by successive collective-bargaining agreements between APDA and Local 239, although only WER became a member of the APDA. WER made pension and welfare contributions on behalf of the employees of both companies and deducted dues from the paychecks of the employees of both companies. In communications with the Union, employees of both Companies were listed as being employees of WER.

Accordingly, I conclude that WER and LIE constitute a single employer and are jointly and severally liable for one anothers unfair labor practices.

DiPrima was the sole shareholder of both companies. The name "The Engine Factory" appears on the D. Engine employees payroll checks, but is not used in any other aspect of the business. DiPrima, the manager of D. Engine, testified that he did not know much about "The Engine Factory #1," but that it "was a name at one point also." Canonico, president of D. Engine, failed to appear at trial or to produce subpoenaed documents regarding "The Engine Factory #1, Ltd." A respondent's failure to produce evidence "raises the presumption that if produced, the evidence would be unfavorable to his cause." *Master Security Services*, 270 NLRB 543, 552 (1984). I therefore conclude that based on the evidence available, it appears that The Engine Factory and the Engine Factory #1, Ltd. have no real independent existence apart from D. Engine, and that the three companies are either a single-integrated enterprise or alter ego employers, or both. Accordingly, I conclude D. Engine, The Engine Factory, and The Engine Factory #1 should be held jointly and severally liable for the unfair labor practices of D. Engine Rebuilders, Inc.

The test used to determine whether an individual employer has delegated authority to a multiemployer unit to bind the employer by group action is "whether the members of the group have indicated from the outset an unequivocal intention to be bound in collective-bargaining by group rather than individual action, and whether the union representing their employees has been notified of the formation of the group and the delegation of bargaining authority to it, and has assented and entered upon negotiations with the groups representative." *Komatz Construction v. NLRB*, 458 F.2d 317 (8th Cir. 1972). The standard for excluding an employer from a multiemployer bargaining unit is "evidence of an intent to pursue an individual course of action with respect to labor relations." *Ruan Transport*, 234 NLRB 241, 242 (1978).

An employer or union which wishes to withdraw from a duly established multiemployer bargaining unit may do so only "upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multi-employer negotiations." *Retail Associates*, 120 NLRB 388, 395 (1958). If collective-bargaining negotiations have begun, withdrawal from a multiemployer bargaining unit must be by mutual consent, by both the union and the multiemployer unit, absent unusual circumstances. *Retail Associates*, 120 NLRB at 395. In the absence of unusual circumstances or consent by the union, an employers untimely withdrawal from a multiemployer unit does not relieve him from the obligations of any agreement that is ultimately reached. *NLRB v. Corbett Press*, 401 F.2d 673, 675 (2d Cir. 1968).

In the instant case, Wyandanch Engine, as owned and operated by DiPrima, paid dues to the APDA annually, to cover the period from July 1, 1985, through June 30, 1992. Negotiations for the 1992–1995 contract commenced in late 1991 or early 1992, and the contract was ratified in May 1992. As late as April 8, 1992, DiPrima attended a meeting of the APDA concerning the progress of the negotiations. In May 1992, after the contract was ratified, DiPrima received a letter from the APDA, indicating that if he did not pay his dues, he would become subject to individual negotiations with Local 239. However, rather than choosing to negotiate individually with Local 239 or withdraw from the APDA, DiPrima chose to pay his APDA dues. Accordingly, I conclude that all WER's actions in this regard demonstrate an intent to be bound by group, rather than individual action, and WER and LIE were bound by the 1992–1995 APDA agreement.

Even where an employer expressly disavows its intent to be bound by a union contract, such a disavowal is effectively canceled if the employer voluntarily abides by the terms of the contract, thereby assuming by assent the obligation to honor the contract and be bound by it. *Eklunds Sweden House Inn*, 203 NLRB 413, 418 (1973); see also *United States Can Co*., 305 NLRB 1127, 1136–1137 (1992).

In the instant case, both WER and LIE voluntarily abided by the terms of each successive Local 239 contract, from 1985 through 1995. Although WER fell behind in its pension and welfare payments starting in 1991, it continued to make contributions in behalf of the employees of both companies until 1993, well into the 1992-1995 contract period. Accordingly, I also conclude that under a contract adoption theory, both WER and LIE were bound to honor the 1992–1995 contract.

An employer "commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." E.g., *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991). By discontinuing their funds contributions without bargaining with the Union, I conclude WER and LIE effected an unlawful unilateral change. Accordingly, I conclude WER and LIE are liable for unpaid funds contributions from the 10(b) date of October 26, 1993, until they ceased doing business in April 1996. Although the 1992 collective-bargaining agreement expired on March 31, 1995, terms and conditions that are part of an expired collective-bargaining agreement, including benefit fund plans and related reporting requirements, survive contract expiration and cannot be altered without bargaining." *MBC Headwear*, 315 NLRB 424 fn. 3 (1994). No such bargaining occurred.

In *Perma Vinyl Corp.,* 164 NLRB 968 (1967), the Board held that a bona fide purchaser "who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct," and therefore the predecessor and successor employers were held jointly and severally liable for the predecessor's unfair labor practices. Id. at 969. One of the factors the Board relied on in finding that the successor purchaser had notice of Perma Vinyl's unfair labor practices was the fact that the president of Perma Vinyl, who had personally participated in Perma Vinyl's unfair labor practices, became the manager of successor U.S. Pipes plastics division, and thus his knowledge of the unfair labor practices could be imputed to U.S. Pipe. Id. at 968, 972; see also *M & J Supply Co*., 300 NLRB 444, 444–446 (1990); see also *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

In *Golden State Bottling Co.*, supra, the United States Supreme court upheld the Board's imposition of liability on a bona fide purchaser which acquired a business with knowledge of the predecessor's unfair labor practices, for the same public policy reasons as those set forth by the Board in *Perma Vinyl*. In *Golden State*, similarly to *Perma Vinyl*, the successor's knowledge of the ULPs was presumed from the fact that the predecessor's secretary and manager of the bottling business, became the general manager and president of the successor company. *Golden State*, supra at 173. Moreover, this individual had personally engaged in the unfair labor practices and "closely followed the progress of the litigation." Ibid. The Supreme Court held that it was permissible to draw the inference that this individual informed his prospective employer of the litigation before completion of the sale, and to discredit respondent's testimony to the contrary. Id. at 173–174.

In the instant case, DiPrima, the president of the predecessor Employer, became the manager of the successor Employer, D. Engine, having personally participated in the predecessor's unfair labor practices. These circumstances give rise to a presumption that D. Engine acquired the business with knowledge of the unfair labor practices. *Perma Vinyl*, supra, at 968, 972; *Golden State*,supra, at 173. Moreover, the record contains ample additional evidence that Canonico acquired the business of WER and LIE with knowledge of the predecessor's unfair labor practices. During the negotiations leading to the sale of DiPrima's business, Canonico asked numerous questions about its creditors. DiPrima told Canonico about the extent of the debt to the Union, explaining that WER had discontinued paying into the pension and welfare funds because it could no longer afford to pay. Moreover, Canonico's own affidavit states that DiPrima's lawyer told Canonico that DiPrima was in

a court case with the Union. Prior to the meetings between Canonico and DiPrima, a unit employee also told Canonico about WER's debt to the Union. Although there is no direct evidence that Canonico knew specifically about the NLRB case at the time he acquired the business of WER and LIE, it is only necessary to prove that the successor employer had "notice of the facts of the unfair labor practices at the time of the takeover." *St. Marys Foundry*, 284 NLRB 221, 234 (1987). Moreover, although DiPrima denied having told Canonico about either the pending unfair labor practice case or the ERISA case, I conclude it is not credible that he told Canonico about the amount of money the Union was claiming, without mentioning the context in which the Union was making this claim.

With respect to the public policy considerations raised in the *Golden State* line of cases, Canonico and his companies have become the beneficiaries of the predecessor's unfair labor practices, in that union support has been undermined by the Union's inability to provide medical benefits during the past few years. The predecessor's unremedied unfair labor practices laid the groundwork for D. Engine's own unfair labor practices, particularly the failure to meet and bargain in good faith and the failure to sign an agreed-on collective-bargaining agreement. In addition, as in *Perma Vinyl, ICC,* and *Golden State*, D. Engine and related companies have continued to operate the business in unchanged form, employing the predecessor's bargaining unit employees without hiatus. Thus, there "has been no real change change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices." *Perma Vinyl*, supra at 969; see also *ICC Air Services Corp*., 316 NLRB 396, 402 (1995). Although many *Golden State* cases have involved 8(a)(3) violations, a *Golden State* successor employer may also be held liable for the predecessor's failure to make funds contributions, in violation of Section 8(a)(5) of the Act. *Marbro Co*., 310 NLRB 1145 (1993).

In *ICC*, one of the factors contributing to a finding that there had been a "business relationship" between the predecessor and successor companies, was that the "owner and president of [the successor] maintained . . . contact with the owners of the predecessor as he assisted them in closing." *ICC,* supra at 395. In the instant case, there appears to have been a period of time, from about December 1995, through April 1996, when the predecessor (WER and LIE) and successor (D. Engine) operated concurrently, D. Engine not only retained the owner of the predecessor as his manager, but helped to shy him away from a lot of his legal problems by helping him to evade creditors and circumvent the bankruptcy laws.

Thus, the record evidence establishes that D. Engine acquired the assets of WER and LIE with notice of the facts constituting the predecessor's unfair labor practices, and that there was a business relationship, or a "clearly identifiable and connecting interest," between the predecessor and successor employers.

Accordingly, I conclude D. Engine, and related companies, are a Golden State successor, and are jointly and severally liable for the unfair labor practices of WER and LIE. Were a predecessor employer is defunct, as in the present case, the successor employer may be held fully liable for its predecessor's unfair labor practices. *ICC,* supra, at 395. In addition I conclude it is possible that in a compliance proceeding, the corporate veil could be pierced and DiPrima could be found individually liable for his companies' unfair labor practices.

Under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), a new employer which purchases or otherwise acquires the business of a predecessor employer, and which conducts essentially the same business as the predecessor employer, is obligated to recognize and bargain with the bargaining representative of the predecessors employees, if it hires enough of the predecessor's employees so as to constitute a majority of its work force. In the instant case, when DiPrima purchased WER and LIE from John Franke in 1985, the two companies continued in the same line of business as before. DiPrima retained 17 out of 20 of Franke's employees, enough to constitute a majority of DiPrima's employees. Hence, the two companies, as owned and operated by DiPrima, became a *Burns* successor to the two companies as owned and operated by Franke. As a *Burns* successor, DiPrima's companies were obligated to recognize and bargain with Local 239, which Franke's companies had recognized and bargained with since 1982.

Similarly, when Canonico and D. Engine purchased the business of WER and LIE, they remained in the same line of business and retained a majority of the predecessor's employees.

Accordingly, I conclude that D. Engine is a *Burns* successor, obligated to recognize and bargain with Local 239, the bargaining representative of its predecessor's employees.

Section 8(d) of the Act sets forth "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good-faith with respect to wages, hours, and other terms and conditions of employment" 29 U.S.C. Section 158(d). An Employers refusal to meet with the bargaining representative of its employees, and dilatory tactics such as refusing to return telephone calls and "giving [a] union negotiator the run-around" with respect to setting up bargaining sessions, are violative of Section 8(a)(5) of the Act. E.g., *J & C Towing Co*., 307 NLRB 198 (1992).

In the instant case, Canonico, President of D. Engine, repeatedly failed to appear at scheduled bargaining sessions for a period of more than 6 months, starting on January 10, 1996. On several occasions, he did not telephone the Union's agents to let them know that he was canceling. In one instance, a letter from the Union suggesting a new meeting went unanswered.

When Canonico first met the Union's agents on December 20, 1995, he assured them he would "sign a contract tomorrow" if the Union lent him $250,000. In June of 1996, after 5 months of consistently failing to appear at negotiation meetings, Canonico notified a union agent by telephone that there would be no union at his facility unless Local 239 lent him $300,000. Canonico did not meet with the Union's agents until July 23, 1996.

I conclude that by failing to meet with the Union's agents from January 10, 1996, until July 23, 1996, and by indicating that he would not sign a contract or recognize the Union in the absence of an illegal loan, D. Engine failed to recognize and bargain with the bargaining representative of its employees, in violation of Section 8(a)(5) of the Act.

An employer who reaches an agreement with a union concerning wages, hours, and working conditions of its employees, and then refuses to sign a written contract embodying the terms of the agreement, thereby violates Section 8(a)(5) of the Act by refusing to bargain in good faith. *Heinz v. NLRB*, 311 U.S. 514 (1941). The contract law rules of offer and acceptance are a guideline in determining whether an agreement has been reached, although the technical rules of contract law are not

always controlling in labor relations negotiations. *Kasser Distiller Products*, 307 NLRB 899, 903 (1992) (citing *F. W. Means v. NLRB*, 377 F.2d 683, 686 (7th Cir. 1967); and *Lozano Enterprises v NLRB*, 327 F.2d 814, 817 (9th Cir. 1964). An offer can be accepted and the parties bound without the agreement being reduced to writing and signed. *Kasser Distiller Products*, supra (citing *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982)). Insignificant, insubstantial discrepancies of minor, inadvertent admissions will not relieve a Respondent of the obligation to execute a contract. *Metro Medical Group*, 307 NLRB 1184, 1191, 1192 (1992). In order to find acceptance of an offer, all that is needed is conduct manifesting intention to agree, to abide and be bound by the terms of an agreement. Id. For example, in *Kasser Distiller Products*, the following verbal exchange showed that the parties had reached an agreement: "[Union:] Do we have an agreement? [Employer:] Yes, we do." 307 NLRB at 904–905.

In the instant case, the August 7, 1996 bargaining session resolved all outstanding issues between the parties. At a meeting of all the employees, both union members and nonunion members, the contract was ratified. Canonico manifested his "intention to agree, to abide and be bound by the terms of an agreement" when he said on August 7, 1996, "I guess we have a contract." When Evaristo asked Canonico when he wanted to sign, Canonico did not deny that a contract had been reached; instead, he agreed to meet with the Union for the purpose of embodying the full agreement in writing and signing the contract. On several subsequent occasions, Canonico indicated that he wished to sign the contract that had been agreed upon. However, he failed to appear at numerous meetings set up for this purpose, from August 21, 1996, through May 13, 1997. accordingly, I conclude Canonico's refusal to sign the agreed-on collective-bargaining agreement is violative of Section 8(a)(5) of the Act.

The Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees; an employer who deals directly with its unionized employees regarding terms and conditions of employment violates Section 8(a)(5) of the Act. *Allied-Signal*, 307 NLRB 752, 753 (1992). Direct dealing need not take the form of actual bargaining. Id. The issue is whether an employers direct solicitation of employee sentiment over working conditions is likely to erode the Union's position as exclusive representative. *Allied-Signal*, supra at 753 (citing *Modern Merchandising*, 284 NLRB 1377, 1379 (1987). In *Allied Signal*, the Board held that "Going behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions . . . plainly eroded the position of the designated representative." 307 NLRB at 754.

During the spring of 1996, after several months of repeatedly canceling meetings with Local 239, D. Engine, by its shop foreman, individually polled employees as to whether they would be willing to pay half the premiums for their medical benefits coverage. In so doing, D. Engine clearly bypassed the exclusive bargaining representative of its employees, dealing directly with its employees regarding a mandatory bargaining subject.

The second instance of direct dealing occurred in May 1997. The Union and D. Engine had verbally agreed on a contract 9 months before, in August 1996, but D. Engine had repeatedly canceled meetings set up for the purpose of finalizing the written version of the contract, and executing it. Then in May 1997, without notifying the Union, D. Engine made substantial changes to the agreed-on contract, and presented them directly to its employees. Although the employees did not agree to the proposed changes, D. Engine (by Canonico) told the Union that they had. Accordingly, I conclude that by reneging on its previous agreement with the Union, and discussing proposed changes directly with its employees, D. Engine was clearly bypassing the employees bargaining representative and engaging in bad-faith bargaining, in violation of Section 8(a)(5) of the Act.

A statement amounting to a threat of plant closure in retaliation for unionization is violative of Section 8(a)(1) of the Act, unless the statement constitutes a factual prediction that due to circumstances beyond the employer's control, unionization will result in plant closure. *American Tempering*, 296 NLRB 699, 708 (1989); and *Overnite Transportation*, 296 NLRB 669, 670–671 (1989).

In the instant case, when Canonico was served with a charge alleging that he failed to meet and bargain with the Union, he told the shop steward that if things did not go his way, he would close the door, "wait whatever extended period of time he had to in order to get away with it" and reopen as a nonunion shop. I conclude such statement to be a threat to shut down the shop temporarily as a means of avoiding the Union, rather than a prediction that economic problems would force the Company to shut down. In addition, the threat to rehire employees "on his own terms" constituted a threat to unilaterally change the terms and conditions of employment that had been established when Canonico first took over the business. By telling the shop steward that he would take adverse action "if things did not go his way," I conclude Canonico was threatening his employees that any effort by them to aggressively pursue their rights would be duly punished. I find such statement to be a violation of Section 8(a)(1).

Employment discrimination under Section 8(a)(3) is governed by the Boards decision in *Wright Line*, 251 NLRB 1083 (1980), which sets forth the following test: "First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employers decision. Once this is established the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. To establish a prima facie 8(a)(3) violation, the General Counsel must show: (1) that the alleged discriminatee engaged in union or other protected concerted activities; (2) that the employer had knowledge of these activities; (3) that the employers actions were motivated by antiunion animus; and (4) that the discrimination had the effect of encouraging or discouraging union membership. *Downtown Toyota*, 276 NLRB 999, 1014 (1985).

The evidence establishes a prima facie 8(a)(3) violation with respect to both Buehler and Beatty.

Canonico could not have avoided having knowledge of Buehler's union activities, since Buehler, as shop steward, was on the union side of the table in negotiation sessions attended by Canonico. With respect to Beatty, Canonico gave an affidavit stating that he knew Beatty was a union member, and that after Buehlers discharge, Canonico thought Beatty would be the next shop steward. In addition, Beatty was outspoken at union meetings, and at a meeting of all the employees, in his opposition to negotiating positions taken by Canonico. These meet-

ings were attended by shop foreman, a 2(11) supervisor, Dennis Tice, who was also a union member. A supervisor's knowledge of employees' union activities may be imputed to an employer. *Control Service*., 305 NLRB 435 (1991).

The record contains ample evidence of Canonico's antiunion animus. In the spring of 1996, he threatened to "close the door" and reopen as a nonunion shop; this remark was directed at discriminatee Buehler. In the fall of 1996, when Buehler asked why he was being laid off out of seniority order, Canonico replied that D. Engine was not a union shop. In the spring of 1996, and again in May 1997, Canonico bypassed the Union and dealt directly with employees. He has a history of refusing to meet with the Union. On May 15 and September 25, 1997, Canonico sent fax messages stating that the Union was "No Longer Permitted on My Property" and that there was "No Union here."

Additionally, D. Engine presented no evidence at trial as to the reason for the discharges, and the answer is silent as to any affirmative defenses. In this respect, Canonico, although subpoened by Counsel for the General Counsel refused to comply and did not testify in this trial. Although both Buehler and Beatty were given pink slips stating that they were being laid off, there is no evidence that a layoff was economically necessary. Prior to the layoff, neither discriminatee noticed any reduction in the level of work, and Buehler was working a substantial amount of overtime. Nobody else was laid off at the same time as Buehler, or Betty. Moreover, shortly after the discharge of Beatty, an engine builder, he was replaced with two new engine builders. In the month that elapsed between Buehler's discharge and Beatty's, an additional two new employees were hired, for a total of four.

It was foreseeable that the discharge of Buehler, the shop steward, and Beatty, a strong union adherent, would have an adverse effect on employee rights. This is particularly true when the discharges are viewed in combination with D. Engine's other unfair labor practices, and with the layoff of Prevete, Buehlers successor as shop steward.

I therefore conclude that the General Counsel has made a prima facie showing that the discharges of Buehler and Beatty violated Section 8(a)(3) of the Act. Respondent D. Engine has failed to produce any evidence that would tend to rebut the prima facie showing. Accordingly, I conclude that both Buehler and Beatty were discharged, in violation of Section 8(a)(1) and (3) of the Act.

I conclude that Canonico's May 15, 1997 fax message, indicating that the Union was no longer permitted on his property, and the September 24, 1997 facsimile message stating "There is No Union here," constitute a withdrawal of recognition from the Union. Such a withdrawal of recognition from the exclusive bargaining representative of its employees is impermissible under Section 8(a)(5) of the Act unless an employer can show "either (1) the union [does] not in fact enjoy majority support, or (2) the employer [has] a "good faith doubt, founded on a sufficient objective basis, of the Union's majority support.'' *NLRB v Curtin Matheson Scientific*, 494 U.S. 775 (1990). No such defenses have been raised by D. Engine. Moreover, an employer may not lawfully withdraw recognition from a union if the employers own unlawful conduct improperly undermines the Union's majority status. *Bay Area-Los Angeles Express*, 275 NLRB 1063 (1985). D. Engine, by unlawfully refusing to sign the agreed-upon contract with the Union, and by unlawfully discharging the strongest union adherents, has undermined Local 239's majority support by creating the impression that union membership and support can produce no benefit for its employees. Accordingly, I conclude D. Engine's withdrawal of recognition is violative of Section 8(a)(5) of the Act.

In addition, the May 15 fax message was sent shortly before the scheduled June 16 trial date, and shortly after the employees' refusal to agree to Canonico's unilateral changes to the contract. I conclude the fact that the fax message was addressed to a Board agent is evidence that the pending unfair labor practice case triggered the message. Moreover, Canonico has established a pattern of committing unfair labor practices in retaliation for the processing of Board cases. For example, in the spring of 1996, Canonico's 8(a)(1) threat to close the plant was triggered by the filing of an 8(a)(5) charge against him. The September 25, 1997 fax message was sent shortly before the October 7, 1997 resumption date. Thus, I conclude Canonico's refusal to continue to allow union representatives on the premises, and his withdrawal of recognition from the Union, violated Section 8(a)(4) of the Act, in that they were a means of retaliating against employees for their cooperation with the Board's investigation and processing of the case against him.

CONCLUSIONS OF LAW

1. Respondents WER, LIE, D. Engine, and Engine Factory are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents WER and LIE constitute a single-integrated business and are a single employer within the meaning of the Act.

3. Respondents D. Engine and Engine Factory constitute a single-integrated business and are a single employer within the meaning of the Act.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. APDA is an employer association engaged in negotiating collective-bargaining agreements on behalf of its members.

6. At all times material, as set forth and described above, Respondents WER and LIE have been members of APDA and have designated it to conduct collective-bargaining negotiations on their behalf and as the exclusive representative of its employees.

7. Pursuant to a collective-bargaining agreement negotiated between APDA and the Union, expiring on March 31, 1995, the Union was the collective-bargaining representative of the following appropriate unit of Respondents WER and LIEs employees:

> All auto electricians, auto mechanics, auto mechanic helpers, bookkeepers, clericals, drivers, foremen, glaziers, head office clericals, head parts clerks, head shipping and receiving clerk and dispatcher, machinists, machinists helpers, parts clerks, rebuilders, shipping and receiving clerks, and shop helpers, employed by Respondents at their Wyandanch, New York, facility, excluding all other employees, guards and supervisors as defined in Section 2(11) of the Act.

8. Respondents D. Engine, and Engine Factory are a successor to Respondents WER and LIE.

9. On or about December 20, 1995, Respondents D. Engine and Engine Factory recognized the Union as the exclusive collective-bargaining representative for its employees in the unit described above, and commenced individual collective-bargaining negotiations with the Union.

10. Respondents D. Engine and Engine Factory reached agreement on all terms and conditions for a collective-bargaining agreement.

11. Respondents D. Engine and Engine Factory refused to execute the above collective-bargaining agreement although requested by the Union to do so in violation of Section 8(a)(1) and (5) of the Act.

12. From on or about October 26, 1993, until late 1995, or early 1996, when they ceased operations, Respondents WER and LIE failed and refused to remit contributions to the welfare and pension funds, and union dues, as provided for in their collective-bargaining agreement, which expired on March 31, 1995, in violation of Section 8(a)(1) and (5) of the Act.

13. Respondents D. Engine and Engine Factory threatened its employees with plant closure and loss of sales because of their membership in, and/or their activities on behalf of the Union, in violation of Section 8(a)(1) of the Act.

14. Respondents D. Engine and Engine Factory dealt directly with the unit employees, notwithstanding that such employees were represented by the Union, in violation of Section 8(a)(1) of the Act.

15. From October 26, 1993, through April 1997, Respondents WER, LIE, D. Engine, and Engine Factory have refused to pay to the Union pension and welfare funds required by the collective-bargaining agreement which expired on March 31, 1995, in violation of Section 8(a)(1) and (5) of the Act.

16. Respondents WER, LIE, D. Engine, and Engine Factory discharged its employees Albert Buehler and John Beatty because of their membership in, and/or their activities on behalf of the Union in violation of Section 8(a0(1) and (3) of the Act.

REMEDY

1. Respondents WER, LIE, D. Engine, and Engine Factory, must, upon requests by the Union, execute the collective-bargaining agreement agreed upon on August 7, 1996.

2. Respondent WER, LIE, D. Engine, and Engine Factory, must jointly and severally make whole the Union for pension and welfare funds owed to the Union from October 26, 1993 through April 1996, plus interest as computed by *New Horizons for the Retarded* 283 NLRB 1173 (1987).

3. Respondents WER, LIE, D. Engine, and Engine Factory must jointly and severally offer to reinstate Albert Buehler and John Beatty to their former, or substantially equivalent positions of employment and make them whole for any loss of earnings and/or other benefits they may have suffered since the dates of their discharge, until an unconditional offer of reinstatement is sent to them, with interest as computed above.

4. Respondents WER, LIE, D. Engine, and Engine Factory must remove from their records all references to Buehler's and Beatty's discharge.

[Recommended Order omitted from publication.]